

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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DINGMAN P.,

Plaintiff,

v.

5:22-CV-0203  
(ML)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

LEGAL AID SOCIETY OF MID-NEW YORK, INC.  
SYRACUSE OFFICE

ELIZABETH LOMBARDI, ESQ.

Counsel for the Plaintiff  
221 South Warren Street, Suite 310  
Syracuse, New York 13202

SOCIAL SECURITY ADMINISTRATION  
Counsel for the Defendant  
6401 Security Boulevard  
Baltimore, Maryland 21235

GEOFFREY PETERS, ESQ.  
Special Assistant U.S. Attorney

MIROSLAV LOVRIC, United States Magistrate Judge

**ORDER**

Currently pending before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

in connection with those motions on July 13, 2023, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination was supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by Plaintiff in this appeal.

After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is

**ORDERED** as follows:

- 1) Plaintiff's motion for judgment on the pleadings (Dkt. No. 9) is DENIED.
- 2) Defendant's motion for judgment on the pleadings (Dkt. No. 10) is GRANTED.
- 3) The Commissioner's decision denying Plaintiff Social Security benefits is AFFIRMED.
- 4) Plaintiff's Complaint (Dkt. No. 1) is DISMISSED.
- 5) The Clerk of Court is respectfully directed to enter judgment, based upon this determination, DISMISSING Plaintiff's Complaint in its entirety and closing this case.

Dated: July 19, 2023  
Binghamton, New York

A handwritten signature in black ink, reading "Miroslav Lovric", written over a horizontal line.

Miroslav Lovric  
United States Magistrate Judge  
Northern District of New York

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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P

vs.

5:22-CV-203

COMMISSIONER OF SOCIAL SECURITY

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DECISION AND ORDER

July 13, 2023

The HONORABLE MIROSLAV LOVRIC,  
DISTRICT MAGISTRATE JUDGE

A P P E A R A N C E S

For Plaintiff: ELIZABETH LOMBARDI, ESQ.

For Defendant: GEOFFREY PETERS, ESQ.

*Ruth I. Lynch, RPR, RMR, NYSRCR  
Official United States Court Reporter  
Binghamton, New York 13901*

1           THE COURT: So the Court begins by indicating that  
2     in this case Plaintiff has commenced this proceeding  
3     pursuant to Title 42 U.S. Code 405(g) to challenge the  
4     adverse determination by the Commissioner of Social Security  
5     finding that Plaintiff was not disabled at the relevant  
6     times and therefore ineligible for the benefits that she  
7     sought.

8           By way of background, the Court notes as follows:  
9     Plaintiff was born in 1972. She is currently approximately  
10    51 years of age. She was approximately 42 years old on the  
11    date of her application for benefits. Plaintiff stands  
12    approximately 5 feet 1 inch in height and weighs  
13    approximately 139 pounds.

14          Plaintiff is originally from Burma, where she  
15    attended school up to the eighth grade. She has resided in  
16    the United States since approximately 2004, and Plaintiff  
17    testified that she had taken some classes here including  
18    English lessons. Plaintiff spoke and understood English but  
19    utilized an interpreter for some of her administrative  
20    hearings. Plaintiff's prior employment included positions  
21    as a kitchen worker in a restaurant and a laundry room  
22    attendant at a nursing home.

23          Procedurally, in this case the Court notes the  
24    following: This case has a lengthy procedural history.  
25    Plaintiff applied for Title II and Title XVI benefits on

1 April 11, 2014, alleging an onset date of October 8, 2013.  
2 In support of her application for disability benefits,  
3 Plaintiff claims disability based on a number of physical  
4 and mental impairments including breast cancer, chest pain,  
5 right arm pain, left shoulder pain, and depression.

6 Plaintiff's application was initially denied on  
7 May 29, 2014. Following a hearing, Administrative Law Judge  
8 Elizabeth Koennecke issued an unfavorable decision on  
9 May 24, 2016. The Appeals Council remanded Plaintiff's  
10 claim for additional consideration on June 27, 2017.

11 ALJ Koennecke held additional hearings and issued another  
12 unfavorable determination on March 26, 2018. After the  
13 Appeals Council denied Plaintiff's request for review, on  
14 April 5, 2019, Plaintiff commenced a proceeding in the  
15 Northern District of New York. On January 13th, 2020,  
16 United States Magistrate Judge Andrew T. Baxter remanded the  
17 case consistent with the parties' stipulation to remand the  
18 matter. Following the resulting remand order from the  
19 Appeals Council, Plaintiff appeared at a hearing on  
20 April 30th, 2021, before a new ALJ, that being ALJ John P.  
21 Ramos. ALJ Ramos issued an unfavorable decision on June 15,  
22 2021. ALJ Ramos's June 15, 2021 decision became the  
23 Commissioner's final determination after the Appeals Council  
24 denied Plaintiff's request for review on February 3rd, 2022.

25 This action was commenced on March 3, 2022, and it

1 is timely.

2 In his June 15, 2021 decision, ALJ Ramos first  
3 determined that Plaintiff met the insured status  
4 requirements of the Social Security Act through March 31,  
5 2019, and he then commenced the familiar five-step test for  
6 determining disability.

7 At step one, ALJ Ramos concluded that Plaintiff  
8 had not engaged in substantial gainful activity since the  
9 alleged onset date of October 8, 2013.

10 At step two, ALJ Ramos concluded that Plaintiff  
11 had the following severe impairments, those being residuals  
12 of breast cancer treatment with impairment of right  
13 shoulder; degenerative joint disease of the left shoulder;  
14 degenerative disc disease of the lumbar and cervical spine;  
15 and depressive disorder.

16 At step three, ALJ Ramos concluded that Plaintiff  
17 did not have an impairment or combination of impairments  
18 that met or medically equaled the severity of one of the  
19 listed impairments in 20 CFR Sections 404.1520(c) and  
20 416.920(c). In making this determination, the ALJ  
21 considered listings at 1.15, dealing with disorders of the  
22 skeletal spine; listing 1.16, dealing with lumbar spinal  
23 stenosis; listing 1.18, dealing with abnormality of major  
24 joint; and listing 13.10, dealing with breast cancer.

25 Next, the ALJ determined that Plaintiff has the

1 residual functional capacity, also referred to as RFC, to  
2 perform less than the full range of light work.  
3 Specifically, the ALJ found Plaintiff can occasionally reach  
4 overhead with both upper extremities; stand or walk for six  
5 hours in an eight-hour workday for up to two hours at a  
6 time; sit for six hours in an eight-hour workday; frequently  
7 climb stairs and ramps but never climb ladders, ropes, or  
8 scaffolds; and frequently balance, crouch, crawl, and stoop.  
9 The ALJ found Plaintiff can understand and follow simple  
10 instructions and directions; perform simple tasks with  
11 supervision and independently; maintain attention and  
12 concentration for simple tasks; and regularly attend to a  
13 routine and maintain a schedule. The ALJ also found  
14 Plaintiff can interact with supervisors on an occasional  
15 basis after learning her job duties from an instructional or  
16 demonstration lesson; can work in proximity to coworkers but  
17 should only have brief occasional interaction with coworkers  
18 and should have no contact with the public. Finally, the  
19 ALJ found Plaintiff can make decisions directly in the  
20 performance of simple work and should work in a position  
21 where they are not responsible for the work of or required  
22 to supervise others.

23 At step four, the ALJ relied on the vocational  
24 expert testimony to determine that Plaintiff was unable to  
25 perform any past relevant work.

1           Again relying on the vocational expert testimony,  
2           the ALJ found that considering Plaintiff's age, education,  
3           work experience, and RFC that there are jobs that exist in  
4           significant numbers in the national economy that she can  
5           perform. More specifically, the vocational expert testified  
6           that Plaintiff can perform the requirements of  
7           representative occupations such as cleaner, housekeeper,  
8           garment folder, and scrap separator. Accordingly, the ALJ  
9           found that Plaintiff was not disabled from the alleged onset  
10          date of October 8, 2013 through the date of the ALJ's  
11          decision.

12           Now turning to the plaintiff's argument as set  
13          forth in Plaintiff's brief, I begin as follows. First, as  
14          the parties know, this Court's functional role in this case  
15          is limited and extremely deferential. The Court must  
16          determine whether correct legal principles were applied and  
17          whether the determination is supported by substantial  
18          evidence, defined as such relevant evidence as a reasonable  
19          mind would find sufficient to support a conclusion. As the  
20          Second Circuit noted in *Brault v. Social Security*  
21          *Administration Commissioner*, found at 683 F.3d 443, a 2012  
22          case, therein the Circuit indicated this standard is  
23          demanding, more so than the clearly erroneous standard. The  
24          Court noted in *Brault* that once there is a finding of fact,  
25          that fact can be rejected only if a reasonable fact-finder



1 would have to conclude otherwise.

2           Plaintiff in this case in their brief raises three  
3 primary contentions. First, Plaintiff argues that the ALJ  
4 erred in evaluating the medical opinion evidence related to  
5 Plaintiff's ability to reach with her upper extremities.

6           Second, Plaintiff alleges and argues that the ALJ  
7 failed to properly evaluate the vocational expert testimony.

8           And then, third, Plaintiff argues that the ALJ's  
9 handling of Plaintiff's objections to the vocational expert  
10 testimony demonstrated bias that tainted the ALJ's -- that  
11 tainted the degree of disability determination as made by  
12 the ALJ.

13           The Court begins its analysis as follows. The ALJ  
14 considered two medical opinions that directly addressed  
15 Plaintiff's reaching ability. Dr. S. Putcha, a state agency  
16 consultant, reviewed Plaintiff's then current medical  
17 records as after May 27, 2014 and prepared an opinion  
18 regarding Plaintiff's physical impairments. He summarized  
19 Plaintiff's history of breast cancer treatment including  
20 chemotherapy, radiation, double mastectomy, and  
21 reconstructive surgery. Based on this history, Dr. Putcha  
22 opined that Plaintiff had limited ability to reach overhead  
23 or reach in front and/or laterally but could perform light,  
24 one-arm work on a sustained basis. The Court notes at this  
25 juncture that the ALJ also assigned varying weights to

1 opinions from Plaintiff's treating oncologist, Plaintiff's  
2 therapist, and several physical and psychiatric consultative  
3 examiners, but Plaintiff has not challenged the ALJ's  
4 evaluation of that evidence.

5 ALJ Ramos called Dr. Steven Goldstein as an  
6 independent medical expert to testify at the April 30th,  
7 2021 hearing. Dr. Goldstein summarized Plaintiff's medical  
8 record, including a recent diagnosis of degenerative disc  
9 disease and imaging reports from April 2020 showing tears in  
10 her right and left rotator cuff. Based on this review,  
11 Dr. Goldstein's opinion included a limitation to occasional  
12 overhead lifting with the right and left arm but otherwise  
13 imposed no limitations on Plaintiff's use of her upper  
14 extremities. Dr. Goldstein testified that he based his  
15 opinion on the medical record as well as his own experience  
16 treating patients with similar injuries.

17 The ALJ assigned "great weight" to Dr. Goldstein's  
18 opinion and incorporated most of his opined limitations,  
19 including occasional overhead reaching, into his RFC  
20 determination. The ALJ assigned no specific weight to  
21 Dr. Putcha's opinion but rejected the additional limitations  
22 on lateral and forward reaching as inconsistent with  
23 Dr. Goldstein's testimony and the documented improvement in  
24 Plaintiff's condition as reflected in medical records post  
25 dating Dr. Putcha's review.

1           Plaintiff contends that the ALJ erred by failing  
2     to assign a specific weight to Dr. Putcha's opinion and by  
3     failing to incorporate additional reaching limitations into  
4     the RFC. This court rejects both of those arguments.

5           Even though the ALJ failed to assign a particular  
6     weight to the state agency consultant's opinion, he  
7     reasonably, that being the ALJ reasonably explained that  
8     Dr. Putcha's May 2014 review was limited to records close in  
9     time to Plaintiff's recovery from breast cancer and surgery  
10    and that Dr. Goldstein's less restrictive opinion was more  
11    consistent with the overall treatment record and supported  
12    by Dr. Goldstein's hearing testimony, including  
13    cross-examination by Plaintiff's counsel. See, for example,  
14    case of *Buscemi v. Colvin*, that's 13-CV-6088P, and that's  
15    found at 2014 Westlaw 4772567 at page 13, and that's a  
16    Western District New York September 24, 2014 case, therein  
17    finding that ALJ's failure to assign a specific weight to  
18    medical opinion was harmless because the decision reliably  
19    demonstrates that the ALJ afforded some weight to that  
20    opinion but afforded other opinions greater weight because  
21    of greater consistency with the record evidence. As part of  
22    his decision, the ALJ highlighted examination reports from  
23    June 2014, September 2016, and March of 2020 showing, quote,  
24    very good to full, end quote, range of motion in both of  
25    Plaintiff's shoulders despite lingering pain and were thus

1 consistent with Dr. Goldstein's less restrictive opinion.

2 In resolving the conflict between Dr. Putcha and  
3 Dr. Goldstein's assessments of Plaintiff's functional  
4 limitations, the ALJ was exercising his authority to choose  
5 between properly submitted medical opinions and explained  
6 his reasons for doing so. It is well-established that it is  
7 the province of the ALJ to resolve such conflicts in the  
8 evidence. Therefore, this court will not reweigh the  
9 evidence and finds no grounds for remand arising from the  
10 ALJ's evaluation of the medical opinion evidence.

11 Plaintiff raises two challenges to the vocational  
12 expert testimony. First, Plaintiff contends that the ALJ  
13 did not adequately resolve conflicts between the vocational  
14 expert's description of representative job requirements and  
15 the Dictionary of Occupational Titles, which is also  
16 referred to as the DOT. Second, Plaintiff argues that the  
17 vocational expert overestimated the number of jobs available  
18 for an individual with Plaintiff's RFC. This court finds  
19 neither of those arguments persuasive.

20 The DOT is published by the Department of Labor  
21 and provides detailed descriptions of the requirements for a  
22 variety of jobs. At the April 30th, 2021 hearing, the  
23 vocational expert testified that Plaintiff could perform  
24 representative occupations of cleaner/housekeeper, also  
25 garment folder, and scrap separator. Consistent with the

1 regulations and case law, the ALJ asked the vocational  
2 expert whether his testimony conflicted in any way with the  
3 DOT. In response to questioning from the ALJ and  
4 Plaintiff's counsel, the vocational expert testified that  
5 the, quote, no public contact, end quote, restriction in the  
6 RFC was not directly addressed by the DOT but that he had  
7 relied on a number of factors that can generally be  
8 characterized as professional experience in evaluating the  
9 RFC's compatibility with the various job listings in the  
10 DOT. This included direct observation of the work as  
11 generally performed and interviews with employees who  
12 performed those jobs, as well as review of the job  
13 requirements in the DOT and the related standard  
14 occupational classification system developed by the  
15 U.S. Bureau of Labor Statistics. The ALJ referenced these  
16 factors in his evaluation of the vocational expert's  
17 testimony and thus had a reasonable basis for deeming the  
18 vocational expert's conclusions to be reliable. In light of  
19 this testimony and the associated analysis, this court finds  
20 this case distinguishable from its remand order in  
21 Robert G. v. Saul, found at 19-CV-576, Northern District New  
22 York August 4, 2020. In that case the vocational expert  
23 provided no explanation for an apparent conflict between his  
24 testimony addressing the level of social interaction  
25 required for a particular job and the DOT.

1           The vocational expert testified that each of the  
2   representative occupations existed in significant numbers in  
3   the national economy. Specifically he relied upon the  
4   Department of Labor's Occupational Employment Statistics,  
5   also referred to as OES, estimates of 418,000 housekeeping  
6   jobs, 69,056 garment folder jobs, and 31,125 separator jobs.  
7   In response to questioning from Plaintiff's counsel, the  
8   vocational expert provided greater detail into the -- his  
9   methodology for estimating jobs, explaining that he compared  
10   the OES quarterly estimate for jobs in the national economy  
11   against the applicable DOT and SOC job classification codes.  
12   The vocational expert further testified that he recognized  
13   that the precision of these estimates was impacted by the  
14   broad scope of some of these job classification codes but,  
15   in his professional opinion, the approach still produced the  
16   most reliable estimate of available jobs.

17           During this questioning, Plaintiff's counsel  
18   presented alternative job calculation figures derived from  
19   Job Browser Pro and Skill Tran software programs, suggesting  
20   far fewer jobs were available in the representative  
21   occupations. In response, the vocational expert challenged  
22   the accuracy of these alternate estimates. The vocational  
23   expert explained that he generally found those software  
24   programs unreliable because the developers fail to disclose  
25   the methodology behind their estimates. He also found the

1 specific numbers cited by Plaintiff's counsel to be  
2 inconsistent with his knowledge of the applicable industries  
3 and the overall job market.

4           Plaintiff contends that the hearing transcript  
5 demonstrates that the vocational expert's testimony  
6 regarding available jobs is poorly supported and unreliable  
7 and that the ALJ's reliance upon that testimony is an error  
8 requiring remand. This court rejects that contention. The  
9 record demonstrates that the vocational expert had  
10 appropriate professional expertise and experience. His  
11 testimony described his application of that professional  
12 expertise and experience to the RFC determination, along  
13 with his general methodology for estimating available jobs  
14 in response to extensive questioning from vocational expert  
15 and Plaintiff's counsel. Therefore, the ALJ had substantial  
16 evidence to support his step five determination under the  
17 standards articulated by the Supreme Court and the Second  
18 Circuit. See case of *Biestek vs. Berryhill*, 139 Supreme  
19 Court 1148, that's a 2019 Supreme Court case, noting that an  
20 ALJ may properly consider a vocational expert's professional  
21 qualifications, coherent testimony, and general explanation  
22 of methodology as substantial evidence to support job  
23 estimates. See also case of *McIntyre v. Colvin*, that's  
24 found at 758 F.3d 146 at page 152. That's a Second Circuit  
25 2014 case, and therein finding that ALJ had reasonably

1     relied on vocational testimony based upon professional  
2     experience, clinical judgment, and consistency with record.

3             Plaintiff's assertion that the Job Browser Pro and  
4     Skill Tran software provided a better approach does not  
5     alter that conclusion, particularly where the vocational  
6     expert explained why he found the software unreliable. See  
7     case of *Galiotti v. Astrue*, that's 266 Fed Appendix 66 at  
8     page 68. That's a Second Circuit 2008 case. And therein  
9     finding step five determination supported by substantial  
10    evidence despite Plaintiff's objection to vocational  
11    expert's vague explanation of how he estimated the number of  
12    available jobs. See also case of *Diaz v. Berryhill*,  
13    17-CV-735, and that is found at 2018 Westlaw 4462366 at  
14    page 9, and that's a District of Connecticut September 18,  
15    2018 decision. And therein the court finding that  
16    substantial evidence supported step five determination  
17    despite Plaintiff's objection to methodology employed by the  
18    vocational expert. Also see case of *Frazier v. Commissioner*  
19    of Social Security, 16-CV-4320, that's found at 2017  
20    Westlaw 1422465 at page 19, that's a Southern District New  
21    York April 20th, 2017 case, and therein the court rejecting  
22    Plaintiff's objection to vocational expert's use of Skill  
23    Tran software to estimate job numbers.

24             Plaintiff further contends that the ALJ exhibited  
25    bias in his consideration and overruling of her objection to



1 the vocational expert testimony. The hearing transcript  
2 shows that the ALJ interrupted Plaintiff's counsel during  
3 her questioning of the vocational expert because, quote, it  
4 is repetitive and I understand what you are getting at, end  
5 quote. The ALJ also challenged Plaintiff's counsel to  
6 provide additional evidence to support her alternative job  
7 numbers. In his decision, the ALJ formally overruled  
8 Plaintiff's objection to the vocational expert testimony and  
9 characterized her counsel as, quote, essentially acting as  
10 an unqualified vocational expert and witness, end quote,  
11 during this hearing before the ALJ.

12           There is a rebuttable presumption that an ALJ has  
13 acted in an unbiased manner. While the ALJ's handling of  
14 the Plaintiff's objections to the vocational expert  
15 testimony can fairly be described as contentious or  
16 confrontational, Plaintiff has not shown the extreme  
17 hostility or prejudice required to support an allegation of  
18 bias. Indeed, although the ALJ prematurely ended counsel's  
19 line of questioning regarding the estimated job numbers, he  
20 allowed Plaintiff an opportunity to submit written arguments  
21 and analyzed the dispute at length as part of the step five  
22 determination. Because the ALJ marshalled substantial  
23 evidence to support his resolution of this question, this  
24 court does not find any bias in his determination. Although  
25 Plaintiff highlights evidence that may support each of her

1 arguments, as long as the disability determination is  
2 supported by substantial evidence, which it is here, this  
3 court finds that it is, then the court must affirm the  
4 Commissioner's determination.

5 As a result and based upon this reasoning and  
6 analysis, it is the decision of this court that Plaintiff's  
7 motion for judgment on the pleadings is denied. Defendant's  
8 motion for judgment on the pleadings is granted.  
9 Plaintiff's complaint is dismissed. And the Commissioner's  
10 decision denying Plaintiff benefits is affirmed.

11 This constitutes the analysis, reasoning, and  
12 decision of this court.

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CERTIFICATE OF OFFICIAL REPORTER

I, RUTH I. LYNCH, RPR, RMR, NYS Realtime Certified Reporter, Federal Official Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/s/ Ruth I. Lynch

RUTH I. LYNCH, RPR, RMR, NYSRCR  
Official U.S. Court Reporter